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DISPUTE RESOLUTION ALERT

IN THIS ISSUE

KENYA

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Afrikaans: A language of teaching and learning?

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KENYA

The future of litigation in Kenya: Virtual or hybrid?

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The reporting of the first COVID-19 case in Kenya in March 2020 completely disrupted businesses and people's interactions. Most sectors of the economy were affected by the pandemic, including the judiciary. In a bid to curb the spread of the pandemic, the Kenyan Government issued various directives to contain people's movements and interactions in all parts of the country. On or about 30 March 2020, the now retired Hon. Chief Justice David Maraga ordered the closure of all courts in the country for 14 days to minimise the spread of pandemic within court precincts. This meant that litigants and the public could not access courts, threatening the constitutional right to a fair trial and access to justice.

Article 48 of the Constitution of Kenya, 2010 guarantees that all persons have the right to access justice and that nothing shall impede this right. The total inaccessibility of the law courts threatened this right, prompting the judiciary to come up with measures to facilitate access to justice by Kenyans despite the restrictions on movement of persons.

Like everyone else, the judiciary had to embrace technology and move to providing its services virtually. The timely rolling out of the online e-filing platform in the Milimani Commercial Courts in Nairobi proved to be a reprieve for litigants who could now file court documents online. This eliminated the infamous congestion common in the registries and helped to curb the further spread of COVID-19. Further, the Civil Procedure (Amendment) Rules, 2020 came into force, which now allow for the servicing of documents electronically, even by means of WhatsApp. As such, the online filing and service of documents has since proved to be cost effective as it saves time and resources that would otherwise be used when doing it physically.

Virtual court appearances

In addition to the e-filing system, the judiciary embraced *"online court"* or virtual litigation where parties to a suit appear in court virtually. The virtual court has revolutionised the delivery of justice to parties and continued to safeguard the right to access to justice. Microsoft Teams is the most commonly used platform for online court proceedings. Anyone who wants to access court must do so using a virtual court link from the Kenya Law website www.kenyalaw.org. To access court, one must have access to a smart phone or computer, together with a reliable and stable source of internet.

The advantages of virtual court proceedings are immense. For one, parties no longer have to travel to court for matters as they can access court from anywhere, reducing the overall cost of accessing justice. Further, virtual court saves on time and offers great convenience to litigants who can focus on other tasks as they wait for their matters to proceed online. The benefits of virtual court proceedings have not been lost on the bench either as they now enjoy minimal interruptions from parties and retain greater control of court proceedings. Most importantly, virtual courts have greatly minimised the spread of COVID-19 within court premises which has helped the Government's efforts to control the virus. All in all, the flexibility, safety, and cost effectiveness of virtual litigation have made it preferable to traditional litigation in physical courts for many litigants.

KENYA

The future of litigation in Kenya: Virtual or hybrid?*...continued*

It is therefore essential for the Kenyan judiciary to continue to make use of virtual court proceedings, even after the pandemic, with the option of physical court for those who would prefer it. The hybrid system would ultimately promote the aim and purpose of Articles 48 and 50 of the Constitution of Kenya.

Right to a fair hearing

Despite these immense benefits, some litigants have argued that virtual court proceedings are not appropriate for hearing cases. In both civil and criminal cases, hearing is a critical stage where a litigant calls witnesses to testify in support of their case. Ideally, during a hearing only one witness should be present at a time in court to give their testimony. This guarantees the veracity and integrity of the testimony and weeds out any attempt of evidential collusion. The exclusion of other witnesses from virtual court proceedings during a hearing may not be guaranteed. On this basis, virtual court proceedings may well be seen to threaten Article 50 of the Constitution, which guarantees the right to a fair hearing.

Another key component of the right to fair hearing is the right to challenge evidence by facing and cross-examining witnesses. Some have argued that this right is severely limited when hearings are conducted virtually as the parties are not able to physically see one another. Additionally, it is hard for the court to read witnesses' body language during a virtual hearing which means that a judge or magistrate may not be able to assess a witness' demeanour to determine their credibility. Therefore, although virtual courts are designed to promote access to justice they may as well infringe on the right to a fair hearing.

Internet access

Access to the internet is also a major challenge that threatens the access to virtual courts and therefore the right to a fair hearing. Not all Kenyans have access to internet, which is aggravated by the unequal distribution of access to electricity, especially in rural areas. With such a significant number of the population possibly outside the loop, it is paramount to consider the impact that this has to the right to access justice.

Clearly, both physical and virtual court proceedings have advantages and disadvantages. Although virtual proceedings are flexible and cost effective, not all litigants and courts across the country are equipped to go fully virtual. Some remote court stations still do not have good access to internet and electricity which are essential for virtual hearings.

In March 2020, Chief Justice, David Maraga, issued online court practice directions for the protection of all court users in the subordinate and high courts in Kenya. These practice directions encouraged the use of virtual proceedings by courts to dispose of matters filed before them. Virtual court proceedings have now been with us for almost two years, demonstrating that online court is possibly the future of litigation and the same ought to be embraced. It is therefore essential for the Kenyan judiciary to continue to make use of virtual court proceedings, even after the pandemic, with the option of physical court for those who would prefer it. The hybrid system would ultimately promote the aim and purpose of Articles 48 and 50 of the Constitution of Kenya.

Desmond Odhiambo, Christine Mugenyu and Johnstone Odeya

Afrikaans: A language of teaching and learning?

The stated objective of the language policy was to institute measures to enhance the status of indigenous African languages, while also phasing out Afrikaans and therefore removing the guarantee that courses be offered in both Afrikaans and English. In effect, English became the sole medium of tuition and learning.

The Constitutional Court considers UNISA's language policy

> *"Afrikaans is a veritable potpourri of different languages, melded into what has been referred to in this court as 'one of the cultural treasures of South African national life, widely spoken and deeply implanted, the vehicle of outstanding literature, the bearer of a rich scientific and legal vocabulary and possibly the most creole or "rainbow" of all South African tongues'"*. Per Sachs J in Gauteng Provincial Legislature, Gauteng School Education Bill of 1995 [1996] ZACC4;1996 (3) SA 165 (CC); 1996 (4) BCLR 537 (CC) (Gauteng Provincial Legislature), Paragraph 49

Afrikaans as a medium for teaching and learning has been a controversial topic for years, but particularly so over the last few months. Political parties have also entered the fray, with the Democratic Alliance up in arms regarding the new Language Policy Framework for Public Higher Education (National Language Policy).

On 22 September 2021 the Constitutional Court (CC) handed down a bilingual judgment in the matter of *Chairperson of the Council of UNISA v AfriForum NPC* (CCT 135/20) [2021] ZACC 32, the latest in a trilogy of cases relating to policy decisions by universities to discontinue Afrikaans as a medium of teaching and learning. The previous decisions concerned the language policies adopted by the University of the Free State (UFS) (*Afriforum v University of the Free State* [2018] (2) SA 185 (CC)) and the University of Stellenbosch (*Gelyke Kanse v Chairperson, Senate of the University of Stellenbosch* [2020] (1) SA 368 (CC)), but the CC emphasised that each case must be decided on its own facts and merits. One cannot simply adopt a one-size-fits-all approach to discontinue Afrikaans as a teaching and learning medium at universities.

Background

The University of South Africa (UNISA) is the sole distance-learning institution of higher education in South Africa and the largest on the continent. The vast majority of UNISA's students are unable to, or prefer not to, attend residential universities, and rely on distance learning.

UNISA's 2006 language policy provided that UNISA would make tuition available in the official languages of South Africa on the basis of functional multilingualism.

The 2006 language policy was revised in 2010. The revised language policy envisaged the promotion and advancement of multilingualism, while retaining Afrikaans and English as languages of teaching and learning.

In 2012, UNISA introduced Guidelines for the Discontinuation of Afrikaans in Certain Modules to be read with the 2010 language policy. After a comprehensive review, a draft language policy and its implementation plan, providing for only English as a language of teaching and learning, was formulated in 2014. On 30 March 2016 and 28 April 2016 respectively, UNISA's Senate and Council took the decision to adopt and implement a revised language policy. The stated objective of the language policy was to institute measures to enhance the status of indigenous African languages, while also phasing out Afrikaans and therefore removing the guarantee that courses be offered in both Afrikaans and English. In effect, English became the sole medium of tuition and learning.

Afrikaans: A language of teaching and learning?*...continued*

Afriforum launched an application in the High Court in Pretoria to review and set aside UNISA's language policy based on procedural irregularities and its inconsistency with section 29(2) of the Constitution. It further sought to interdict the implementation of the new policy pending the review application.

Dispute

Section 27(2) of the Higher Education Act 101 of 1997 empowers a university, subject to the policy framework determined by the Minister of Higher Education and Training, through its Council and with the concurrence of its Senate, to determine its language policy, publish it and make it available upon request.

Afriforum launched an application in the High Court in Pretoria to review and set aside UNISA's language policy based on procedural irregularities and its inconsistency with section 29(2) of the Constitution. It further sought to interdict the implementation of the new policy pending the review application.

Although the review application was partly based on the Promotion of Administrative Justice Act 3 of 2000 (PAJA), on the assumption that the impugned decision constituted administrative action, the CC concluded in UFS matter that language policy decisions did not constitute administrative action within the ambit of PAJA. Afriforum accordingly abandoned its reliance on PAJA but persisted to challenge on the principle of legality.

Section 29(2) of the Constitution, which deals with the fundamental right to education, provides that:

> *"Everyone has the right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable. In order to ensure the effective access to, and implementation of, this right, the state must consider all reasonable educational alternatives, including single medium institutions, taking into account:*
>
> *(a) equity;*
>
> *(b) practicability; and*
>
> *(c) the need to redress the results of past racially discriminatory laws and practices."*

The High Court held that there was a prima facie violation of the section 29(2) right to receive an education in the language of one's choice and mother tongue, but few students made use of the Afrikaans as teaching and learning medium. It further held that the constitutional right to receive an education in the language of one's choice is qualified by the term *"where that education is reasonably practicable"*.

Afrikaans: A language of teaching and learning?*...continued*

Ultimately, the SCA concluded that UNISA had failed to establish that the adoption of its new policy in 2016 was conducted in a constitutionally compliant manner and did not detract from the section 29(2) right without justification.

On rationality, the High Court concluded that section 27(2) of the Act confers powers to UNISA to adopt and implement a language policy. The language policy was rationally linked to the powers conferred to UNISA in terms of this section. While the National Language Policy supports Afrikaans as a language in academia and science, it does not prohibit the adoption of policies that discontinue Afrikaans as learning and teaching medium.

Supreme Court of Appeal

Afriforum successfully appealed to the Supreme Court of Appeal (SCA). The SCA relied on the *Head of Department, Mpumalanga Department of Education v Hoërskool Ermelo* [2009] ZACC 32; 2010 (2) SA 415 (CC); 2010 (3) BCLR 177 (CC) (*Ermelo*), emphasising that where a learner already enjoys the benefit of being taught in an official language of their choice, the state has a negative duty not to diminish this right without appropriate justification. In order to justify the removal of the dual English/Afrikaans model of teaching and learning, UNISA had to show that it was not reasonably practicable to sustain it, but the SCA found that UNISA failed to do so.

The SCA noted that that the justification by UNISA, based on availability of resources, was unconvincing in the light of the normative content of section 29(2) of the Constitution. The SCA further emphasised that compliance with section 29(2) goes "*beyond the availability of resources*".

Regarding equity considerations that are central to the determination of reasonable practicability, the SCA reasoned that the facts of the present matter were distinguishable from those in the UFS and University of Stellenbosch matters. Those cases concerned the revision of previous language policies that had led to racial segregation in the lecture rooms or created an exclusionary hurdle for students at the university. UNISA, however, is a distance-learning university and there is no threat of Afrikaans creating segregated classes or fostering racial supremacy.

Ultimately, the SCA concluded that UNISA had failed to establish that the adoption of its new policy in 2016 was conducted in a constitutionally compliant manner and did not detract from the section 29(2) right without justification. Accordingly, the SCA declared the adopted language policy unconstitutional and unlawful and set it aside. UNISA was ordered to reinstate modules that had been discontinued pursuant to the adoption of the language policy.

Constitutional Court

In a judgment penned by Mahjiedt J, the CC provided a synopsis of the history and development of Afrikaans as a language and dealt with the iniquitous portrayal of Afrikaans and its true roots. It was pointed out that although Afrikaans has undeniably been employed as a tool of oppression, its history is far more multifaceted and nuanced that that. The CC highlighted the misconception that Afrikaans is "*a white language*". Today, Afrikaans is spoken predominantly by black people.

In considering the language policy adopted by UNISA, the CC reiterated that "*the right to education in a language of one's choice is entrenched in section 29(2), circumscribed only by appropriateness and reasonableness*". UNISA, as an organ of state, was obliged to comply with the

Afrikaans: A language of teaching and learning?*...continued*

The CC held that UNISA was constrained to advance facts on affidavit to justify its adoption of the language policy by demonstrating that it applied its mind to the considerations listed in section 29(2) and that it complied with the prescripts of that section.

terms of section 29(2) of the Constitution. The CC held that UNISA was constrained to advance facts on affidavit to justify its adoption of the language policy by demonstrating that it applied its mind to the considerations listed in section 29(2) and that it complied with the prescripts of that section. Its decision to abandon Afrikaans had to be tested against objective considerations of reasonableness and there had to be some evidence of how UNISA went about applying its mind. The CC held that UNISA could not simply state that it took a decision without explaining how it was taken and indicating what was considered. The CC concluded that the SCA's finding that the evidence advanced by UNISA regarding costs, demographics, a "*dwindling demand*" for Afrikaans tuition, and equity did not support UNISA's contentions, was unassailable.

The CC held that to give meaningful effect to the right in section 29(2), all reasonable educational alternatives had to be taken into account and considerations of equity, practicability and the need to redress the consequences of our apartheid past, must feature prominently.

Ultimately, UNISA's decision in 2016 to adopt the new language policy and discontinue Afrikaans as a medium of learning and teaching, contravened section 29(2) of the Constitution, rendering that decision invalid.

When considering an appropriate remedy, the CC stated that the Constitution required that the constitutional invalidity be corrected or reversed where it can no longer be prevented and that where constitutional rights are violated, the relief must effectively vindicate those rights. But, to effectively vindicate rights, the relief must be reasonably capable of implementation. In this instance, the CC held that UNISA, must be afforded the deference to do the necessary feasibility investigations, take the decision it regards as most reasonably practicable and to implement the required changes. In doing so, UNISA must duly comply with the requirements encapsulated in section 29(2) of the Constitution. The order of invalidity was therefore suspended until the start of the 2023 academic year.

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Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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